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75172	7590	08/15/2008	EXAMINER	
Client 21058			POHNERT, STEVEN C	
c/o DARBY & DARBY P.C.			ART UNIT	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Attachment to Advisory

Continuation of box 3: The amendments filed on 8/4/2008 has presented new claims 39 and 40 which were not previously presented. The claims would have new limitations that have not previously been searched and thus require further search and consideration and will not be entered.

Continuation of box 11:

The request for reconsideration has been considered but does not place the application in condition for allowance for the reasons of record in view of the non-entry of the after final amendment.

The response asserts that neither Cronin, Han nor Lockhart teaches the limitation "configured to be identified by an intensity of at least one of the unique signal molecules. These arguments are to the amendment that has not been entered and thus are moot.

The response further asserts that Cronin's teaching of hybridization is not labeling of a nucleic acid sequence. This argument has been thoroughly reviewed but is not considered persuasive as the claims the hybridization of a labeled nucleic acid to a probe nucleic acid does result in the probe nucleic acid being labeled. First, MPEP 716.01(c) makes clear that "The arguments of counsel cannot take the place of evidence in the record. In re Schulze , 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). Examples of attorney statements which are not evidence and which must be supported by an appropriate affidavit or declaration include statements regarding

unexpected results, commercial success, solution of a long - felt need, inoperability of the prior art, invention before the date of the reference, and allegations that the author(s) of the prior art derived the disclosed subject matter from the applicant." Here, the statements labeling being different than hybridization is argument by counsel that is not supported by evidence.

This should not be construed as an invitation for providing evidence. As further stated in the MPEP 716.01 regarding the timely submission of evidence:

A) Timeliness.

Evidence traversing rejections must be timely or seasonably filed to be entered and entitled to consideration. *In re Rothermel*, 276 F.2d 393, 125 USPQ 328 (CCPA 1960). Affidavits and declarations submitted under 37 CFR 1.132 and other evidence traversing rejections are considered timely if submitted:

- (1) prior to a final rejection,
- (2) before appeal in an application not having a final rejection, or
- (3) after final rejection and submitted
 - (i) with a first reply after final rejection for the purpose of overcoming a new ground of rejection or requirement made in the final rejection, or
 - (ii) with a satisfactory showing under 37 CFR 1.116(b) or 37 CFR 1.195, or
 - (iii) under 37 CFR 1.129(a).

The response further traverses the rejection based on Han asserting that Han does not teach, “the number of unique signal molecules represents the type of nucleotide at each position”. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., the number of unique signal molecules represents the type of nucleotide at each position”) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicants remaining arguments refer to the amended claims and rely solely on the amendments. The applicant provided no further arguments not already considered. Since the arguments were not entered, the arguments are moot. Therefore the arguments drawn to the after final amendments have not been considered.

Conclusions

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven C. Pohnert whose telephone number is 571-272-3803. The examiner can normally be reached on Monday-Friday 7:00-3:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ram Shukla can be reached on 571-272-0735. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Steven Pohnert
/Sarae Bausch/
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